86-515

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JUDY'S FOODS, INC., *et al.*,
Petitioners,

v.

A&B FOOD SERVICES CORP., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Excessive Fines Clause of the Eighth Amendment bars the imposition, in a civil case, of punitive damages that are as much as 35 times greater than the actual damages found.

2. Whether the Due Process Clause bars the imposition of punitive damages absent evidence that satisfies the "clear and convincing" standard of proof.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO SUP. CT. RULE 28.1

The following were appellants in the court of appeals and are petitioners in this Court: Judy's Foods, Inc., General Care Corporation, Marvin P. Friedman and Joel Gordon. Judy's Foods, Inc. is a wholly-owned subsidiary of General Care Corporation which, in turn, is a wholly-owned subsidiary of Hospital Corporation of America.

The following were appellees in the court of appeals and are respondents in this Court: MC Management Corporation No. 4, MC Management Corporation No. 7 and A&B Food Services Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Judy's Foods, Inc., General Care Corporation, Marvin P. Friedman and Joel Gordon petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-6a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1986. A petition for rehearing was denied on August 4, 1986 (App. B, *infra*, 7a-8a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Eighth Amendment provides, in pertinent part:

> "[N]or [shall] excessive fines [be] imposed * * *."

2. The Fourteenth Amendment provides, in pertinent part:

> "No state shall * * * deprive any person of * * * liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. In 1976, petitioner General Care Corporation established a wholly-owned subsidiary corporation in Nashville, Tennessee, known as Judy's Foods, Inc., to enter the "fast-food" franchise business. Petitioners Marvin P. Friedman and Joel Gordon were the principal officers of both General Care and Judy's. App. A, *infra*, 2a. Respondents are three corporations established by two Philadelphia businessmen—Agostine Malerba and Burton Cooperberg—to operate restaurants under franchises from Judy's. *Id.*

Respondents' restaurants did not prosper and eventually were closed. Thereafter, respondents filed a diversity action in the United States District Court for the Middle District of Tennessee, claiming that petitioners had breached the contractual agreements between the parties and had engaged in actual fraud, fraudulent concealment, promissory fraud, constructive fraud, and negligent misrepresentation in the course of their dealings with Malerba.[1] Petitioners contended that respondents' lack of success was due to respondents' own mismanagement and to adverse economic conditions.

Following a trial, the jury exonerated petitioners on respondents' claims of actual fraud, promissory fraud,

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[1] Respondents' complaint also included a claim for conspiracy which was dismissed on petitioners' motion for a directed verdict.

negligent misrepresentation and breach of contract, but found petitioners liable for fraudulent concealment and constructive fraud, and awarded $44,000 in compensatory damages. Additionally, the jury awarded respondents $850,000 in punitive damages.[2] The district court denied petitioners' motion for judgment n.o.v. App. A, *infra*, 3a.

2. On appeal, petitioners argued, *inter alia*, that (1) the district court erred in failing to instruct the jury that fraud must be proven by clear and convincing evidence; and (2) the punitive damages award should be reduced or vacated because Tennessee law requires a reasonable relationship between compensatory and punitive damages and the ratio in this case—of as much as 35 to 1—was far beyond the range generally approved by Tennessee courts.[3]

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[2] These aggregate awards were broken down as follows: for respondent A&B Food Services, $20,000 in compensatory damages and $100,000 in punitive damages; for respondent MC Management Corp. No. 4, $14,000 in compensatory damages and $375,000 in punitive damages; for respondent MC Management Corp. No. 7, $10,000 in compensatory damages and $350,000 in punitive damages. Punitive damages were assessed against petitioners in the following amounts: $50,000 against Judy's and its parent, General Care; $500,000 against Marvin Friedman; and $300,000 against Joel Gordon.

[3] Petitioners also contended that they should not have been found liable for failing to disclose certain information about their business because the decision not to disclose that information was a legitimate exercise of business judgment. Viewed in the light most favorable to respondents, the evidence showed that petitioners failed to disclose: (1) that another fast-food franchisor, Wendy's, threatened to sue Judy's for allegedly copying the Wendy's format; (2) that the ensuing litigation with Wendy's contributed to Judy's decision to change its format; (3) the financial performance of restaurants owned and operated by Judy's itself; (4) the overall financial performance of Judy's; (5) the return of franchise fees to other franchisees; and (6) adverse business circumstances reported to the board of directors.

The trial judge instructed the jury that in ordinary business relationships there is no duty of disclosure and that such a duty

The court of appeals affirmed. App. A, *infra*, 1a-6a. The court did not specifically address petitioners' claim concerning the appropriate standard of proof. With respect to petitioners' claim that the punitive damages awards were excessive and disproportionate, the court of appeals remarked that "Tennessee has never adopted the reasonable relationship test." *Id.* at 5a. The court noted that the Tennessee Supreme Court has held that the reasonableness of punitive damages should be measured against the egregiousness of the defendant's acts and the financial worth of the defendant. *Id.* Under this standard, the court of appeals was "constrained to conclude that the punitive damage awards were not 'contrary to all reason.' " *Id.*

3. On April 22, 1986, several weeks before the court of appeals issued its opinion in this case, this Court decided *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986). In *Aetna*, the appellants challenged an award of punitive damages on the ground, among others, that the award was impermissible under the Excessive Fines Clause of the Eighth Amendment and that the lack of sufficient standards governing the imposition of punitive damages awards contravenes the Due Process Clause of the Fourteenth Amendment. *Id.* at 1589. Although this Court vacated the lower court's judgment on a different

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arises only where there is a fiduciary relationship between the parties. II Tr. 274-75. Although most courts that have considered the issue have held that the franchisor-franchisee relationship is not, as a matter of law, a fiduciary one, *e.g.*, *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 485 (5th Cir. 1984); *Murphy v. White Hen Pantry Co.*, 691 F.2d 350, 354-55 (7th Cir. 1982); *Power Motive Corp. v. Mannesmann Demag Corp.*, 617 F. Supp. 1048, 1052 (D. Colo. 1985); *Amoco Oil Co. v. Cardinal Oil Co.*, 535 F. Supp. 661, 666-67 (E.D. Wis. 1982), the trial court permitted the jury to decide whether there was a fiduciary relationship between the parties. But for this finding, there would have been no wrong for which punitive damages could have been awarded.

ground, it took note of the appellants' constitutional arguments and observed that they "raise important issues which, in an appropriate setting, must be resolved." *Id.*

In light of this Court's statement in *Aetna*, petitioners lodged a supplemental brief with the court of appeals on June 3, 1986, asserting that there was a constitutional dimension to petitioners' arguments about the reasonableness of the punitive damages award and the appropriate standard of proof for punitive damages. On that same day, however, the court of appeals issued its opinion affirming the district court's judgment. Petitioners again presented the constitutional issues in a timely petition for rehearing. The court of appeals denied the petition for rehearing, noting that the issues raised therein "were fully considered upon the original submission and decision of the case." App. B, *infra*, 7a-8a.

REASONS FOR GRANTING THE PETITION

This case presents two important constitutional questions that warrant review by this Court. The first question is whether the Eighth Amendment prohibits the award of excessive and disproportionate punitive damages in civil cases. The second question is whether due process requires that punitive damages may be awarded only if the plaintiff has proved by "clear and convincing evidence" that the defendant acted with the requisite culpability.

Just last Term, in *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986), this Court was confronted with arguments raising very similar constitutional questions concerning the imposition of punitive damages. The Court in *Aetna* noted that the constitutional arguments "raise important issues which, in an appropriate setting, must be resolved." *Id.* at 1589. This case provides the Court with "an appropriate setting" in which to resolve these important issues.

I. The Eighth Amendment Prohibits the Imposition of Excessive and Disproportionate Punitive Damages in Civil Cases.

There can be no question that the Eighth Amendment requires a penalty to be proportionate to the offense. *Solem v. Helm*, 463 U.S. 277, 284-88 (1983). The appropriate question, therefore, is whether the Eighth Amendment applies to punitive damages. The Amendment, by its terms, expressly prohibits "excessive fines." Both the history of this provision and recent decisions of this Court support the conclusion that this prohibition extends to excessive awards of punitive damages in civil cases.[4]

A. *Punitive Damages Are Subject to the Eighth Amendment Because They Are Penal In Nature.*

This Court has recognized that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977). Thus, when a law "imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal." *Trop v. Dulles*, 356 U.S. 86, 96 (1958) (plurality opinion) (footnote omitted). *Accord*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (listing factors relevant to a determination of whether a particular sanction is "penal" in character).

The Court has defined punitive damages in plainly "penal" terms: they are " 'private fines levied by civil juries to punish reprehensible conduct and to deter its

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[4] In addition, a growing body of academic commentary has questioned the constitutionality of unrestrained punitive damages. *See, e.g.*, Jeffries, "A Comment on the Constitutionality of Punitive Damages," 72 Va. L. Rev. 139 (1986); Wheeler, "The Constitutional Case for Reforming Punitive Damages Procedures," 69 Va. L. Rev. 269 (1983).

future occurrence.'" *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979), *quoting Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Similarly, Tennessee has consistently identified punitive damages as a sanction not meant to enrich the plaintiff but to punish the defendant, to deter the defendant and others from repeating his misconduct, and to make a public example of the defendant. *E.g., Huckeby v. Spangler*, 563 S.W.2d 555, 558-59 (Tenn. 1978); *Tipton County Bd. of Educ. v. Dennis*, 561 S.W.2d 148, 152 (Tenn. 1978).

Since punitive damages serve a penal function, they should be constrained by the limits imposed by the Eighth Amendment. As we demonstrate below, the history of the Eighth Amendment also compels this conclusion.

B. *History Demonstrates that the Excessive Fines Clause Applies to Punitive Damages.*

The Eighth Amendment was taken nearly verbatim from the Virginia Declaration of Rights, which in turn was taken verbatim from the English Bill of Rights of 1689. *Solem*, 463 U.S. at 285 n. 10; R. Perry, *Sources of Our Liberties* 235, 247, 303 (1959); A. Howard, *The Road From Runnymede* 205-07 (1968). Thus the Framers intended the Eighth Amendment to provide at least as much protection as its English counterpart provided. *Solem*, 463 U.S. at 286.

The English Bill of Rights of 1689 stated that "'excessive Baile ought not to be required nor excessive Fines imposed * * *.'" 1 Wm. & Mary, sess. 2, ch. 2, *quoted in Solem*, 463 U.S. at 285. By this time English law had long required that monetary penalties must be in proportion to the offense. *See* Jeffries, *supra*, 72 Va. L. Rev. at 154-57; Granucci, "'Nor Cruel and Unusual Punishments Inflicted': The Original Meaning," 57 Cal. L. Rev. 839, 847 (1969). This freedom from excessive penalties was first enshrined in Magna Carta, three chapters of which

were "devoted to the rule that 'amercements' may not be excessive." *Solem*, 463 U.S. at 284 (footnote omitted).

An amercement was a monetary penalty that could be assessed for a variety of wrongs in civil as well as criminal actions. *See* 3 W. Blackstone, *Commentaries on the Laws of England* 376, 398 (facsimile ed. 1979); 4 *Id.* at 372. "Every tort, nay, every cause of civil action," was punishable by amercement. 2 F. Pollock & F. Maitland, *The History of English Law* 519 (2d ed. 1898). *See* Jeffries, *supra*, 72 Va. L. Rev. at 154-55.

Amercements were the forerunners of the "fines" that were the subject of the English Bill of Rights in 1689.[5] Accordingly, when the English Bill of Rights proscribed excessive fines, it proscribed excessive monetary penalties, whether in criminal or civil proceedings. Moreover, the Excessive Fines Clause of the English Bill of Rights encompassed penalties that served the same purposes as are served by punitive damages, which were not judicially recognized until the Eighteenth Century.[6] Because the English bar against excessive fines applied to

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[5] Fines developed because of the procedural rule in Magna Carta that only " 'honest men of the neighbourhood' " were authorized to impose an amercement. Magna Carta, ch. 20 (1215), *quoted in* Jeffries, *supra*, 72 Va. L. Rev. at 155. The effect of this rule was to deprive judges (and the king) of their power to impose amercements. The judges, however, retained the power of imprisonment, and used it to exact monetary penalties. Rather than be incarcerated, a defendant could "make fine with the king." 2 F. Pollock & F. Maitland, *supra*, at 517. The difference between an amercement and a fine thus was wholly procedural, and a fine could be imposed for civil as well as criminal offenses.

Before 1689, other substitutes for amercements developed which resembled punitive damages insofar as the amounts were more than compensatory and were paid to the plaintiffs, rather than to the king. 2 F. Pollock & F. Maitland, *supra*, at 522; *see also* 4 W. Holdsworth, *A History of English Law* 536-37 (3d ed. 1927).

[6] Exemplary damages were first identified by name in 1763. *Huckle v. Money*, 2 Wils, K. B. 205, 95 Eng. Rep. 768 (1763).

civil fines, it therefore follows that the Excessive Fines Clause of the Eighth Amendment also applies to punitive damages.

C. *The Eighth Amendment Requires That Punitive Damages Be Proportionate to the Defendant's Wrong.*

As noted earlier, the bedrock principle embodied in the Eighth Amendment is that bails, fines and other punishments must be proportionate to the offense. "When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality." *Solem*, 463 U.S. at 285-86 (footnote omitted). Indeed, "[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." *Id.* at 286 (footnote omitted). Since "the Eighth Amendment imposes 'parallel limitations' on bails, fines, and other punishments," *id.* at 289, *quoting Ingraham*, 430 U.S. at 664, fines are subject to the limitation of proportionality. And since punitive damages are "fines" within the meaning of the Excessive Fines Clause, punitive damages cannot be disproportionate to the offense.

The punitive damages awarded in this case are disproportionate and therefore excessive under the Eighth Amendment. To begin with, the aggregate punitive damages award of $850,000 is more than nineteen times the aggregate compensatory award of $44,000. The punitive damages awarded to respondents are, respectively, 35, 27, and five times the compensatory award each received. Thus, the punitive damages awards are grossly disproportionate to respondents' injuries.[7]

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[7] Courts in a number of jurisdictions have expressly required proportionality between the amount of punitive damages and the amount awarded for actual damages. *E.g., Maxey v. Freightliner Corp.*, 722 F.2d 1238, 1242, *modified on other grounds*, 727 F.2d 350, 353 (5th Cir. 1984) (applying Texas law); *Stambaugh v. In-*

The punitive damages awards are disproportionate by other standards of measurement as well. For example, under the general statute governing false statements against the federal government, a convicted defendant is subject to a fine not exceeding $10,000. *See* 18 U.S.C. § 1001. By the same token, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* authorizes a private plaintiff to institute a civil action, § 1964, at which treble damages (plus attorney's fees) may be recovered if the defendant can be shown, *inter alia*, to have engaged in "racketeering" activity. § 1961(1). As four Justices of this Court recently observed, a civil RICO action places a defendant in the position of "facing a tremendous financial exposure [producing] a strong interest in settling the dispute." *Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3275, 3294 (1985) (Marshall, J., dissenting). Yet this "tremendous financial exposure" of treble damages pales by comparison to the fine which has been imposed on petitioners here.

In short, this case is an appropriate vehicle for resolving one of the important constitutional questions left open in *Aetna*—whether the Eighth Amendment prohibits excessive punitive damages awards in civil cases.

II. The Due Process Clause of the Fourteenth Amendment Mandates that a Defendant's Culpability For Punitive Damages Must Be Established By "Clear and Convincing Evidence."

The district court instructed the jury that respondents had to prove their fraud claims only by a preponderance of the evidence (II Tr. 258-59). By its silence on the matter, the court indicated that the same burden of proof applied to the question whether petitioner's conduct was sufficiently egregious to warrant imposition of punitive damages (II Tr. 300-01). However, the Due Process

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ternational Harvester Co., 106 Ill. App. 3d 1, 435 N.E.2d 729, 747 (1982), *rev'd on other grounds*, 102 Ill.2d 250, 464 N.E.2d 1011 (1984).

Clause required the court to instruct the jury that it could award punitive damages only if it found by "clear and convincing evidence" that petitioners had acted recklessly, willfully, or wantonly.

The Due Process Clause requires the use of an appropriate standard of proof in a particular proceeding to ensure that the factfinder engages in a properly intensive search for the truth. *Addington v. Texas*, 441 U.S. 418, 423-25 (1979). As the Court has observed, *id.* at 423:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

In determining the appropriate standard of proof in any case, "[t]hree distinct factors" must be considered: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Santosky v. Kramer*, 455 U.S. 745, 754 (1982), *citing Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Application of these factors demonstrates the need for a heightened standard of proof on the question whether a defendant's conduct warrants an award of punitive damages. *See* Wheeler, *supra*, 69 Va. L. Rev. at 291-93, 296-98, 311-14.

First, the interests at stake for a defendant on the issue of liability for punitive damages are generally much greater than on the issue of liability for compensatory damages. As noted earlier, exemplary awards are penal in nature; one of the purposes of punitive damages in

most jurisdictions, including Tennessee, is to punish the defendant for willful or wanton misconduct. Thus, the imposition of punitive damages stigmatizes a defendant and brands him as an egregious wrongdoer. In a commercial case such as this one, an award of punitive damages marks the defendant as one not to be trusted in future transactions. *See Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971) (government-imposed stigma entitles party to due process). In addition, punitive damages expropriate the defendant's property in excess of the amount necessary to compensate the injured plaintiff.

Second, the risks entailed by the possibility of error are not shared equally by both parties, as in an ordinary civil action for compensatory damages. Where punitive damages are at stake, the defendant faces the possibilities of social stigma and of an onerous money judgment. On the other hand, once the plaintiff has recovered compensatory damages, he already has been made whole; so far as the plaintiff is concerned, therefore, punitive damages provide a windfall. Accordingly, the adverse consequences of an erroneous finding in the punitive damages context are much greater for a defendant than for a plaintiff.

Third, the state has an interest in a heightened standard of proof because punitive damages awards serve essentially the same functions as criminal penalties—punishment and deterrence. For this reason, the state has an interest in seeing that such penalties are meted out in a rational and consistent manner.[8]

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[8] Where, as here, a defendant is alleged to have engaged in fraudulent conduct, many jurisdictions require the plaintiff to satisfy the clear and convincing evidence standard in order to establish *any* liability for fraud, let alone liability for punitive damages arising from such fraud. Thus, as the Court observed in *Addington*, a heightened standard of proof is typically used "in civil cases involving allegations of fraud or some other quasi-

The preponderance of the evidence standard does not adequately balance these interests. Because, under that standard, a plaintiff need only tip the scales in its favor "ever so slightly" (II Tr. 264-65), a defendant in an action seeking punitive damages is vulnerable to a massive monetary judgment and to stigmatization based on an uncertain determination of liability. The clear and convincing standard, by contrast, requires the jury to make a more considered finding that a defendant has acted recklessly, willfully, or wantonly. Under the latter standard, a plaintiff would be entitled to recover punitive damages "only if [it] could place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.'" *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). This heightened standard reduces substantially the risk of an erroneous judgment with severe consequences.

The clear and convincing standard also would promote the state's interest in a fair and effective system for imposing civil penalties. Because this higher standard requires juries to scrutinize the evidence more carefully, it would avoid situations in which punitive damages awards are based on only minimal differences in proof. By requiring a more definitive finding that the defendant has engaged in egregious conduct, the clear and convinc-

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wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." 441 U.S. at 424. *See also, Steadman v. SEC*, 450 U.S. 91, 105 (1981) (Powell, J., dissenting). In this case, the courts below determined that petitioners could be held liable for constructive fraud and fraudulent concealment on the basis of evidence satisfying the lesser preponderance of the evidence standard. It was all the more critical, therefore, that the heightened standard of proof be applied before petitioners could be found liable for punitive damages.

ing standard would help to ensure that punitive damages satisfy the state's interests in punishment and deterrence.[9]

The Court has already stated that the application of the Due Process Clause to the procedures by which punitive damages are awarded is an issue worthy of review. This case offers the Court an appropriate opportunity to consider this important issue.

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[9] Without specifically considering whether the clear and convincing standard is constitutionally required, several courts have concluded that punitive damages may be imposed only where there is clear and convincing evidence of willful and wanton misconduct. *Acosta v. Honda Motor Co.*, 717 F.2d 828, 839 (3d Cir. 1983) (applying Virgin Islands law); *Tuttle v. Raymond*, 494 A.2d 1353, 1362-63 (Me. 1985); *The Traveler's Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 358-63 (Ind. 1982); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437, 457-58 (1980). *Cf. Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 851 (2d Cir. 1967). In addition, several states have enacted legislation imposing this higher standard of proof in actions seeking punitive damages. *See* Minn. Stat. Ann. § 549.20 (West Supp. 1986); Mont. Code Ann. § 27-1-221(2) (1985); Or. Rev. Stat. § 30.925 (1981). In one jurisdiction, moreover, a plaintiff seeking punitive damages must meet the reasonable doubt standard. Colo. Rev. Stat. § 13-25-127(2) (1973). *See Tri-Aspen Constr. Co. v. Johnson*, 714 P.2d 484, 486 (Colo. 1986). These recent judicial and legislative actions reflect a growing realization that a heightened standard of proof is required in the punitive damages context as a matter of fundamental fairness.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER J. NICKLES *
K. GREGORY TUCKER
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Dated: September 26, 1986

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-5527

A & B FOOD SERVICES CORPORATION, M.C. MANAGEMENT CORPORATION #7, M.C. MANAGEMENT CORPORATION #8, AB MANAGEMENT CORPORATION #8,
Plaintiffs-Appellees,

v.

JUDY'S FOODS, INC.; GENERAL CARE CORPORATION; MARVIN FRIEDMAN; AND JOEL GORDON,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Tennessee

Decided and filed June 3, 1986

Before: KRUPANSKY and GUY, *Circuit Judges*; and HOLSCHUH, *District Judge*

PER CURIAM. Defendants/appellants Judy's Foods Inc., General Care Corporation, Marvin Friedman and Joel Gordon (collectively referred to as "defendants")

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* Hon. John D. Holschuh, United States District Judge, Southern District of Ohio, sitting by designation.

appealed the jury verdict and denial of their motion for judgment notwithstanding the verdict in this diversity action.

In 1976, General Care Corporation, a Tennessee corporation, formed Judy's Foods, Inc. ("Judy's") for the purpose of owning, operating and franchising limited menu fast food restaurants under the name "Judy's Homestyle Hamburgers and Fixins." The individual defendants, Marvin Friedman and Joel Gordon, were officers, directors, and members of the Executive Committee of both Judy's and General Care Corporation.

Judy's solicited Agostine Malerba ("Malerba"), to become its franchisee in the greater Philadelphia area. In May, 1978, Malerba, relying upon the representations of Judy's, executed an agreement with Judy's, which granted to Malerba an option to franchise a total of fifteen Judy's restaurants in the geographical area of Philadelphia. Malerba assigned one-half of his interest in the franchisee agreements to his business partner, Buddy Cooperberg ("Cooperberg") and they in turn formed the three plaintiff corporations, A & B Food Services Corporation, M.C. Management Corporation # 4 and M.C. Management Corporation # 7 to construct and operate two Judy's franchises in Philadelphia. Malerba and Cooperberg were the sole stockholders of the corporate plaintiffs, and their franchise rights were assigned to the corporations. Plaintiff's completed the construction of two Judy's restaurants which commenced business operations during February and June of 1979. Both restaurants proved to be unprofitable and were closed in December of 1979 and October of 1980 respectively.

Thereafter, plaintiffs initiated this action in the federal district court charging the defendants with fraud, negligent misrepresentation, intentional failure to disclose vital business information, conspiracy, and breach of contract which caused substantial injury to the plaintiffs. At the conclusion of a three and one-half week trial, the jury

returned a verdict in favor of plaintiffs, having concluded that defendants had failed to disclose critical business information to the plaintiffs and had committed fraudulent concealment and constructive fraud. Defendants timely moved for a judgment notwithstanding the verdict or, in the alternative, a new trial. The court denied the motions and this appeal ensued.

Defendants' first assignment of error charged that the district court's submission of the issue of constructive fraud to the jury was improper. Defendants argued that an action for constructive fraud could be maintained only upon proof of a confidential relationship between plaintiff and defendant and that, as a matter of law, the facts of the case did not give rise to such a relationship. This assignment of error is disposed of by *Edwards v. Travelers Insurance Company of Hartford, Connecticut*, 563 F.2d 105, 114 (6th Cir. 1977) wherein this circuit reviewed the Tennessee law of constructive fraud and observed:

> A definition of constructive fraud was given in *Maxwell v. Land Developers, Inc.*, 485 S.W. 2d 869, 875 (Tenn. App.), *cert. denied*, (1972).
>
> > "Constructive frauds are acts, statements or omissions, which operate as virtual frauds on individuals, or which, if generally permitted, would be prejudicial to the public welfare, and are not clearly resolvable into mere accident or mistake, and yet may have been unconnected with any selfish evil design, or may amount, in the opinion of the person chargeable therewith, to nothing more than what is justifiable or allowable." Gibson's Suits in Chancery 5th Ed. Vol. II, § 982, p. 217. Constructive fraud may be established where there is a breach of legal or equitable duty, whether or not fraudulent intent be present. *Bank of Blount County v. Dunn*, (1929) 10 Tenn. App. 95.

> Failure to disclose thus becomes fraudulent when it is the duty of a party having the knowledge to reveal the facts to the other party. *Domestic Serving Machine v. Jackson*, 83 Tenn. 418, 424-25 (1885); *Dozier v. Hawthorne Development Co., supra*, 37 Tenn. App. 279, 262 S.W. 2d 705; *Georgia Marble Co. v. Standard Tile Co., supra*, 19 Tenn. App. 258, 86 S.W. 2d at 432.

The *Edwards* court went on to conclude that the "duty" to disclose known facts arises when there exists a "confidential relationship", which the court defined as:

> one in which "confidence is placed by one in the other and the recipient of that confidence is the dominant personality, with the ability, because of the confidence, to influence and exercise dominion over the weaker or dominated party." *Iacometti v. Frassinelli*, 494 S.W. 2d 496, 499 (Tenn. App.), *cert. denied* (Tenn. 1973).

In light of this circuit's pronouncements in *Edwards v. Travelers Insurance Co. of Hartford, Connecticut*, this court concludes that the trial court properly submitted the issue of the defendant's duty to disclose material business information to the plaintiff franchisees to the jury for disposition. Moreover, a review of the record disclosed that sufficient probative evidence supported the jury's decision that a relationship of confidence existed between the parties that required Judy's to disclose material facts that impacted upon the current and future viability of its entire franchising and business operations and the interrelated business operations of its individual franchisees which Judy's intentionally failed to do.

Defendants also asserted that the district court's refusal to grant a remittitur to reduce the jury's award of punitive damages was error because the award was excessive and disproportionate to the injuries suffered by the plaintiff. It should initially be noted that this circuit

has long adhered to the view that where, as here, a damage award has been determined by the jury and left undisturbed by the trial court, the award bears a presumption of correctness. As this court noted in *Manning v. Altec, Inc.*, 488 F.2d 127 (6th Cir. 1973):

> Where the jury finds a particular quantum of damages and the trial court refuses to disturb its findings on the motion for a new trial, the two factors press in the same direction, and an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial.

488 F.2d at 133 (quoting *Taylor v. Washington Terminal Company*, 409 F.2d 145, 148 (D.C. Cir.) *cert. denied*, 396 U.S. 835 (1969)). *See also Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1572 (6th Cir. 1985).

Moreover, while defendants argued that plaintiffs failed to prove a reasonable relationship between the punitive damages and actual injury, Tennessee has never adopted the reasonable relationship test. Instead, Tennessee courts have ruled that punitive damages "are allowed as punishment of the wrongdoer and are not based so much upon the nature and extent of the injury as they are upon the oppression of the party who does the injury." *Lazenby v. Universal Underwriters Insurance Co.*, 214 Tenn. 639, 642, 383 S.W.2d 1, 4 (1964); *Johnson v. Husky Industries, Inc.*, 536 F.2d 645, 650 (6th Cir. 1976); *Cathey v. Johns-Manville, supra.*

Viewing the evidence under the aforementioned standards, this court is constrained to conclude that the punitive damage awards were not "contrary to all reason." *Manning v. Altec, Inc., supra.* The Tennessee Supreme Court has recently directed that in assessing the reasonableness of awarded punitive damage consideration should be given to the egregiousness of a defendant's acts and the financial worth of the defendant. "The more repre-

hensible the act, the greater the award of punitive damages," *Coppinger Color Lab, Inc. v. Nixon*, 698 S.W. 2d 72, 75 (Tenn. 1985). Defendants' acts in the instant case were certainly egregious and the punitive damages award, when viewed against defendants' aggregate net worth of over thirty-seven million dollars, was not excessive.

This court having reviewed the defendants remaining assignments of error concludes that they are not well taken. For the foregoing reasons, the decision of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-5527

A&B FOOD SERVICES CORPORATION, *et al.*,
Plaintiffs-Appellees,

v.

JUDY'S FOODS, INC., *et al.*,
Defendants-Appellants

[Filed Aug. 4, 1986]

Before: KRUPANSKY and GUY, *Circuit Judges*, and HOLSCHUH* *U.S. District Judge*

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

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* Hon. John D. Holschuh sitting by designation from the Southern District of Ohio.

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

Supreme Court, U.S.
FILED
OCT 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JUDY'S FOODS, INC., *et al.*,
Petitioners,

v.

A & B FOOD SERVICES CORPORATION, *et al.*,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No.: 3-83-0107

A & B FOOD SERVICES CORPORATION, *et al.*

v.

JUDY'S FOOD, INC., *et al.*

JUDGMENT

This action came on for trial, before the Court and a jury, the Honorable Thomas A. Wiseman, Jr., District Judge, presiding and the jury having returned its verdict on January 24, 1985.

At the conclusion of all of the proof the motion for a directed verdict was granted as to the defendants, Charles Martin and Donald E. Nauss. Order announced from the bench adjudging that any liability assessed against Judy's/General Care would be borne by Hospital Corporation of America pursuant to the indemnification provisions (and as required by law) of the merger agreement between Hospital Corporation of America and General Care.

The issues having been duly tried and the jury having duly rendered its verdict, it is Ordered and adjudged that the plaintiff, A & B Food Services, receive compensatory damages in the amount of $20,000.00, plaintiff, MC Management #4, receive compensatory

damages in the amount of $14,000.00 and the plaintiff, MC Management #7, receive compensatory damages in the amount of $10,000.00, against the defendants, Judy's/General Care, Marvin Friedman and Joel Jordan. As to punitive damages the jury returned a verdict against the defendants Judy's/General Care, in the amount of $50,000.00, against Marvin Friedman, in the amount of $500,000.00, and against Joel Gordon, in the amount of $300,000.00; to be divided among the plaintiffs as follows: A & B Food Services, in the amount of $100,000.00, MC Management #4, in the amount of $375,000.00 and MC Management #7, in the amount of $375,000.00.

Furthermore, IT IS ORDERED that upon the jury's verdict for the defendant Anthony Mulle, the plaintiffs case is dismissed as to this defendant.

At the direction of the Court the jury returned to consider the question of whether liability for compensatory and punitive damages was based exclusively on the theory of promissory fraud. The jury returned and reported that the verdict was based on a finding of concealment and constructive fraud, with no liability based on promissory fraud.

Thereupon the jury was polled and each juror affirmed the verdict as being his or her individual verdict.

Dated at Nashville, Tennessee, this the 29th day of January, 1985.

CLERK, U.S. DISTRICT COURT

/s/ Joyce J. Merritt
JOYCE J. MERRITT
Courtroom Deputy

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-83-0107

A & B FOOD SERVICES CORP, *et al.*

v.

JUDY'S FOOD, INC., *et al.*

ORDER

In accordance with the accompanying Memorandum, the plaintiffs' motion to amend and supplement the judgment of the Court is denied. The Court grants the defendant's motion to amend and supplement the judgment.

/s/ Thomas A. Wiseman, Jr.
THOMAS A. WISEMAN, JR.
Chief Judge

Received for Entry 3:30 p.m., May 20, 1985.

Clerk

By /s/ [Illegible]
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3-83-0107

A & B FOOD SERVICES CORPORATION, *et al.*

v.

JUDY'S FOOD, INC., *et al.*

AMENDED AND SUPPLEMENTAL JUDGMENT

This action came on for trial, before the Court and a jury, the Honorable Thomas A. Wiseman, Jr., District Judge, presiding and the jury having duly returned its verdict on January 24, 1985.

At the conclusion of the plaintiffs' proof, defendants' motion for a directed verdict was granted as to all the defendants, based upon so much of the original Complaint as charged a conspiracy, and plaintiffs' claim of conspiracy was ordered dismissed. At the conclusion of all the proof, the motion for a directed verdict was granted as to the defendants, Charles Martin, Donald E. Nauss and Hospital Corporation of America; the Court announced from the bench, however, that any liability adjudged against Judy's/General Care would be borne by Hospital Corporation of American pursuant to the indemnification provision (and as required by law) of the merger agreement between Hospital Corporation of America and General Care.

The issues having been duly tried and the jury having duly rendered its verdict, it is Ordered and Adjudged that the plaintiff, A & B Food Services, receive compensatory damages in the amount of $20,000.00, plaintiff, MC Management #4, receive compensatory damages in the amount of $14,000.00, and the plaintiff, MC Man-

agement #7, receive compensatory damages in the amount of $10,000.00, against the defendants, Judy's/General Care, Marvin Friedman and Joel Gordon. As to punitive damages, the jury returned a verdict against the defendants, Judy's/General Care, in the amount of $50,000.00, against Marvin Friedman, in the amount of $500,000.00, and against Joel Gordon, in the amount of $300,000.00; to be divided among the plaintiffs as follows: A & B Food Services, in the amount of $100,000.00, MC Management #4, in the amount of $375,000.00, and MC Management #7, in the amount of $375,000.00.

Furthermore, IT IS ORDERED that upon the jury's verdict for the defendant, Anthony Mulle, the plaintiffs' case is dismissed as to this defendant.

At the direction of the Court, the jury returned to consider the question of whether liability for compensatory and punitive damages was based exclusively on the theory of promissory fraud. The jury returned and reported that the verdict was based on a finding of concealment and constructive fraud, with no liability based on promissory fraud.

Thereupon the jury was polled, and each juror affirmed the verdict as being his or her individual verdict.

Dated at Nashville, Tennessee, this —— day of February, 1985.

United States District Judge

Supreme Court, U.S.
FILED
OCT 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JUDY'S FOODS, INC., *et al.*,

Petitioners,

vs.

A & B FOOD SERVICES CORP., *et al.*,

Respondents.

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Excessive Fines Clause of the Eighth Amendment bars the imposition, in a civil case, of punitive damages that are as much as 35 times greater than the actual damages found.

2. Whether the Due Process Clause bars the imposition of punitive damages absent evidence that satisfies the "clear and convincing" standard of proof.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO SUP. CT. RULE 28.1

The following were appellants in the Court of Appeals and are petitioners in this Court: Judy's Foods, Inc., General Care Corporation, Marvin P. Friedman and Joel Gordon. Judy's Foods, Inc. is a wholly-owned subsidiary of General Care Corporation which, in turn, is a wholly-owned subsidiary of Hospital Corporation of America.

The following were appellees in the Court of Appeals and are respondents in this Court: MC Management Corporation No. 4, MC Management Corporation No. 7 and A & B Food Services Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-515

JUDY'S FOODS, INC., *et al.*,

Petitioners,

vs.

A & B FOOD SERVICES CORP., *et al.*,

Respondents.

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The Respondents purchased a franchise to construct Judy's Homestyle Hamburger and Fixin Restaurants in Philadelphia, Pennsylvania from the Petitioner, Judy's Food, Inc. (hereinafter Judy's). The Petitioner, Judy's was a wholly-owned subsidiary of the Petitioner, General Care Corp. (hereinafter "General Care"). The individual Petitioners, Marvin Friedman (hereinafter "Friedman") and Joel Gordon (hereinafter "Gordon") were Chairman of the Board, and Vice Chariman of the Board, respectively, of both corporate Petitioners. These men actively participated in the sales of franchises and operations of the franchisor's restaurants.

Respondents were awarded a judgment for compensatory and punitive damages from the Petitioners based upon the jury's finding of fraudulent concealment and constructive fraud. This judgment was approved in the trial court and affirmed by the United States Court of Appeals for the Sixth Circuit.

The Respondents' argument in opposition to the Petition for a Writ of a Certiorari may be summarized as follows:

I

That the Petitioners' failure to raise the alleged Constitutional issues prior to their Petition for Rehearing and Suggestion for Rehearing *En Banc*, constitutes an irrevocable waiver and therefore the Petition for Certiorari should be denied. The Respondents rely upon Rule 46 of the *Federal Rules of Civil Procedure* and the applicable case law which requires the Petitioners to raise these issues in a timely fashion;

II

The Petitioners ask that this Court depart from its historical position that the Eighth Amendment has no application in civil cases. *Ex parte, Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833). This Court has recently held that the Eighth Amendment is not applicable to civil actions. *Whitley vs. Albers*, ___ U.S. ___, 106 S.Ct. 1078 1084 (1986); *Ingraham vs. Wright*, 430 U.S. 651, 666 (1977). If the Court reverses its previous holdings and applies the Eighth Amendment to civil cases, Tennessee law applies the correct Constitutional standard by assessing the reasonableness of the award of punitive damages in light of the egregiousness of

the Defendants' acts and the financial worth of the Defendants. The more reprehensible the acts, the greater the award of punitive damages. *Coppinger Color Lab, Inc. vs. Nixon*, 698 S.W.2d 72, 75 (Tenn. 1985). All the Courts below have reviewed and approved the judgments against the Petitioners in this case.

III

That the Due Process Clause does not mandate that a Defendant's culpability for punitive damages must be established by clear and convincing evidence. *Smith vs. Wade*, 461 U.S. 30, 49, 52-55 (1983); *Curtis Publishing Co. vs. Butts*, 388 U.S. 130, 160 (1967). The standard of proof in civil cases has historically been reserved to the states. *Addington vs. Texas*, 441 U.S. 418, 430-431 (1979).

For these reasons, Respondents assert that the Petition for Writ of Certiorari is without merit and should be denied.

ARGUMENT

I. THE ISSUES RAISED IN THE PETITION ARE UNTIMELY AND HAVE BEEN WAIVED.

The two issues presented in the Petition for Writ of Certiorari were not raised at the trial of this case nor were these issues briefed or argued in the United States Court of Appeals for the Sixth Circuit. The first time the Petitioners presented these issues was after oral argument when a supplemental brief was filed. The Petitioners filed this supplemental brief on the same day the Court of Appeals rendered its opinion affirming the District Court's ruling. (Appendix A) The Sixth Circuit court later rejected the

Petitioners' untimely issues by denying their Petition to Rehear. (Appendix B)

Rule 46 of the *Federal Rules of Civil Procedure* is clear on the issue of waiver. It states:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his *grounds* therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him. [Emphasis added]

The Petitioners failed to object to the Court's charge on the basis of either the Eighth Amendment or the Due Process Clause. Thus, the Petitioners did not afford the trial court an opportunity to consider the alleged errors on the grounds on which they now rely.

> Although formal exceptions are no longer necessary Rule 46 requires that a party, at the time of the ruling or order of the court is made or sought, make known to the court the action that he desires the court to take or his objection to the action of the court and his grounds therefor. This requirement is imposed so the court may have an opportunity to avoid error. [footnote omitted] The requirement is not a mere technical formality

> and is essential to the orderly administration of justice. [footnote omitted] . . .
>
> The rule is enforced because neither the trial court, on a motion for new trial, nor the appellate court, on appeal, will ordinarily take note of errors that were not pointed out to the Court by the party at the proper time. Wright & Miller, *Federal Practice and Procedure*, §2472, pp. 454, 455.

The Petitioners failed to raise either "constitutional objection" during the trial of this cause or the pendency of the appeal. In *Duignan vs. United States*, 274 U.S. 195, 200 (1927), this Court rejected the Appellant's argument that he had been denied the right to a jury trial in violation of the Seventh Amendment of the Constitution and that the forfeiture of the Appellant's lease was a denial of the Due Process Clause under the Fourteenth Amendment. The Court held:

> The court below in enumerating the questions raised and presented made no mention of the constitutional question. The assignment of errors below did not refer specifically to it as required by the rules of that court, and so far as the record discloses, it was not presented there. See *United States vs. Gaffney*, 10 F.2d 694, 696. 274 U.S. at 200

This Court has refused to consider issues not presented in the trial court or in the Court of Appeals. *Tennessee vs. Dunlap*, 326 U.S. 312, 316, n. 3 (1976). (Refused to consider whether Respondent had a property interest in reenlistment because not plead in Complaint nor considered by District Court or Court of Appeals); *Rugendorf vs. United States*, 376 U.S.

528, 534 (1964). (Refused to disclose name of informant because basis for discovery not raised until reply brief in Court of Appeals); *Lawn vs. United States*, 355 U.S. 339, 362 n. 16 (1958). (Refused to consider whether trial court erred in not ordering the production of certain documents because issue not raised in the Court of Appeals); *Singleton vs. Wulff*, 428 U.S. 106, 120-121 (1976) (issue not raised below).

The mandate of this Court has been observed by the Courts of Appeals in cases with facts analogous to the case at bar. In *Wells vs. Rushing*, 760 F.2d 660, 661 (5th Cir. 1985), the United States Court of Appeals, on the Appellant's *Petition for Rehearing*, held that the Appellant's attempt to raise new issues in her Petition to Rehear came "too late." *Jamestown Farmer Elevator, Inc. vs. General Mills, Inc.*, 552 F.2d 1285, 1295-96 (8th Cir. 1977). Issue raised only on rehearing would not be considered.

Apart from the lack of merit in the Petition for a Writ of Certiorari, the Petitioners' failure to timely advance their "constitutional objections" renders the Petition fatally defective.

II. AWARDS OF PUNITIVE DAMAGES ARE NOT SUBJECT TO THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

The Petitioners allege "Both the history of this provision [Eighth Amendment] and recent decisions of this Court support the conclusion that this prohibition extends to excessive awards of punitive damages in civil cases."[1] (Petition, p. 6)

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[1] The Petitioners in support of the above-quoted proposition, fail to cite any decision by this Court or any Appellate Court. Rather, the Petitioners rely on two law review articles. *See*, e.g.,

In *Ex parte, Watkins*, 32 U.S. (7 Pet.), 568, 574 (1833), this Court more than 150 years ago concluded that, "the Eighth Amendment is addressed to Courts of the United States exercising criminal jurisdiction."

In *Ingraham vs. Wright*, 430 U.S. 651 (1977), the Court reaffirmed the exclusive application of the Eighth Amendment to criminal proceedings. Justice Powell's opinion noted that Petitioners' argument that the Eighth Amendment applies in civil cases was neither new nor unique. He stated:

> The Eighth Amendment provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. 430 U.S. at p. 664.
>
> . . .
>
> In the few cases where the Court has had

Jeffries, A Comment On The Constitutionality of Punitive Damages, 72 Va. L.Rev. 139 (1986). Professor Jeffries concedes in his first footnote that this comment grew out of work for a law firm and "was therefor, in origin, not disinterested." 72 Va. L.Rev. at 139. In the last paragraph of Professor Jeffries' comment, he admits that his aim is ". . . merely to open the debate." *Id.* at 158.

> occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty finding the Eighth Amendment inapplicable. . .430 U.S. at pp. 667-668.

This year the Court reaffirmed *Ingraham* in *Whitley vs. Albers*, ___ U.S. ___ , 106 S.Ct. 1078 (1986). Factually, the case involved an inmate who was shot and severely wounded near the end of a riot at the Oregon State Prison. The inmate charged that he was entitled to recover damages against various prison officials under 42 U.S.C. §1983, alleging, *inter alia*, that these officials had violated his rights under the Eighth and Fourteenth Amendments. The Court, in an opinion by Justice O'Connor, reaffirmed its historical position saying:

> The language of the Eighth Amendment, '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,' manifest 'an intention to limit the power of those entrusted with the criminal-law function of government.' *Ingraham vs. Wright*, 430 U.S. 651, 664 (1977). The Cruel and Unusual Punishment Clause 'was designed to protect those convicted of crimes.' *ibid.*, and consequently the Clause applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.' *Id.*, at 671, n. 40. See also *Revere vs. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983); *Bell vs. Wolfish*, 441 U.S. 520, 535, n. 16 (1979). ___ U.S. ___ , 106 S.Ct. 1078, 1084 (1986).

In light of this Court's uniform recognition of the inapplicability of the Eighth Amendment to civil cases, it is difficult to understand the Petitioners' representation that the application of the Eighth Amendment in civil cases presents an "important constitutional question." (Petition, p. 10)

Petitioners conclude the historical portion of their Petition for a Writ of Certiorari with the statement that:

> Because the English bar against excessive fines applied to civil fines, it therefore follows that the Excessive Fines Clause of the Eighth Amendment also applies to punitive damages. (Petition pp. 8, 9)

Petitioners cite no authority for the foregoing proposition. The absence of citation is even more troublesome in light of the opposite conclusion having been reached by this Court in *Ingraham* and *Whitley*.

Punitive damages are a civil remedy. All civil fines or penalties which act to punish are not penal. *Ingraham vs. Wright*, 430 U.S. at p. 670, n. 39; *See, Gertz vs. Welch*, 418 U.S. 442, 460 (1977). The fact that they may be penal in nature does not activate the constitutional protections applicable in criminal cases. *See, U.S. v. Ward*, 448 U.S. 242, 248 (1980).

The distinction between civil and criminal cases is borne out of practical considerations. A commentator on this subject has noted:

> Although some crimes are punishable only by fines, most are also punishable by imprisonment. The punitive damages defendant,

> however, never faces the threat of imprisonment.
>
> In addition, a prior punitive damages award, unlike a criminal conviction, cannot be used to impeach a person when he testifies in a subsequent trial. Convicted felons may forfeit various civil rights, but punitive damages awards produce no such result. Lawyers can be disbarred for conviction of any of several crimes, but not for an adverse punitive damages judgment. Employers commonly ask whether an applicant has been convicted of a crime, but they do not ask whether punitive damages have been assessed against the applicant . . . Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L.Rev. 269, 283-284.

The Petitioners support of their tortured effort to apply the Eight Amendment to punitive damage awards in civil cases, relying upon the criminal case of *Solem vs. Helm*, 463 U.S. 277, 284-288 (1983).[2] Clearly, *Solem* does stand for the proposition that in *criminal* cases the Eighth Amendment requires that

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[2] Petitioners omitted the footnote of the Supreme Court in *Solem*. (463 U.S. at 286, n. 11). Doubtless, this is because the note cited the criminal case of *O'Neal vs. Vermont*, 144 U.S. 323 (1892), where the Defendant unsuccessfully sought to assert the Eighth Amendment prohibition against cruel and unusual punishment insisting that a fifty-four (54) year sentence for selling intoxicating liquor without authority was unconstitutional. The footnote reveals that the majority did not reach this contention because the Appellant failed to include that point in his assignment of errors or his brief. Petitioners in the case at bar have committed the same waiver.

punishment be proportionate to the crime. Petitioners' bootstrap argument then proceeds:

> And since punitive damages are fines within the meaning of the Excessive Fines Clause, punitive damages cannot be disproportionate to the offense.
>
> The punitive damages awarded in this case are disproportionate and therefore excessive under the Eighth Amendment. To begin with, the aggregate punitive damages award of $850,000 is more than nineteen times the aggregate compensatory award of $44,000. (Petition, p. 9)

In the foregoing paragraph, the Petitioners make a quantum leap from this Court's application for a proportionality rule relating *criminal* punishment to the nature of the crime, to an alleged proportionality rule in *civil* cases requiring proportionality between the amounts of compensatory and punitive damages (ignoring the Petitioners' conduct). A review of the record in this case would show why the Petitioners never compare the punitive damages award with their conduct.

This Court has long recognized that punitive damages are assessed in civil cases according to the severity of the Defendants' misconduct, rather than the injury suffered by the Plaintiff. In *Day vs. Woodworth*, 54 U.S. (13 How.) 363, (1851) this Court held:

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a Defendant, hav-

> ing in view the enormity of his offense rather than the measure of compensation to the Plaintiff. 54 U.S. at 371.

The Court of Appeals in this case has noted that Tennessee observes a proportionality test with regard to punitive damages quite similar to that advanced in *Day*. The Court of Appeals held:

> Moreover, while defendants argued that plaintiffs failed to prove a reasonable relationship between the punitive damages and actual injury, Tennessee has never adopted the reasonable relationship test. Instead, Tennessee courts have ruled that punitive damages 'are allowed as punishment of the wrongdoer and are not based so much upon the nature and extent of the injury as they are upon the oppression of the party who does the injury.' *Lazenby vs. Universal Underwriters Insurance Co.*, 214 Tenn. 639 , 642, 383 S.W.2d 1, 4 (1964); *Johnson vs. Husky Industries, Inc.*, 536 F.2d 645, 650 (6th Cir. 1976); *Cathey vs. Johns-Manville, supra.* (Appendix A, p. 5a).

In *Coppinger Color Lab, Inc. vs. Nixon*, 698 S.W.2d 72 (Tenn. 1985), corporate tenants of a building and an adjoining homeowner sued the Defendant, who had hired an arsonist to burn his building in order to collect insurance proceeds. The jury verdict awarded the corporate tenant Fifty Thousand Dollars ($50,000.00) in compensatory damages and One Hundred Thousand Dollars ($100,000.00) in punitive damages. The same jury awarded the adjoining homeowner Fifty-three Thousand Dollars ($53,000.00) in

compensatory damages and Four Hundred Fifty Thousand Dollars ($450,000.00) in punitive damages. These awards were approved by the Court of Appeals and a discretionary review was granted by the Supreme Court of Tennessee. The Tennessee Supreme Court held that the oppressiveness of the Defendant's act toward the homeowner (who narrowly escaped death when her home was engulfed by flames), justified a greater award of punitive damages. The Court stated that "whereas the Defendant could foresee that the fire would result in only property damage to those Plaintiffs [corporate tenants], he could foresee the threat of injury or death of Ms. Gordon [homeowner] and others in her household if the fire should engulf her home as it did." *Id.* at 74-75. The Court found that "the intentional burning of a person's personal residence is much more reprehensible than the burning of a property used only for commercial purposes." *Id.* at 74. The Court held that, "the more reprehensible the act, the greater the appropriate award of punitive damages." *Id.* at 75.

Recently in *Silkwood vs. Kerr-McGee*, 464 U.S. 238 (1984), this Court stated that "punitive damages have long been a part of traditional state tort law." 464 U.S. at 255. The holding of the Tennessee Supreme Court in *Coppinger Color Lab, Inc.*, and the test applied to the award of punitive damages constitutes a valid enforcement of state tort law.

The amount awarded against each Petitioner was calculated to punish. The proper punishment to one man might be inadequate to sufficiently punish another, because of the difference in their financial status. *Breault vs. Friedli*, 610 S.W. 134, 136 (C.A. Tenn. 1980). The punitive damages awarded were

within "the range of reasonableness established by the proof." *Smith vs. Shelton*, 569 S.W.2d 421, 427 (Tenn. 1978)

Thus, the Tennessee "proportionality" test is properly focused on the severity of Defendants' misconduct and their financial worth, rather than the amount of Plaintiffs' compensatory damages. Although the assessment of punitive damage awards is within the jury's discretion, aggressive judicial control over these awards act as an added procedural safeguard. The Petitioners were protected from excessive jury verdicts by judicial control manifested by the trial court's power of remittitur and by the general rule that a verdict based upon prejudice cannot be sustained even when punitive damages are warranted. *Curtis Publishing Company vs. Butts*, 388 U.S. 130, 160 (1967). In this case, the jury, the trial judge, the three member panel of the Sixth Circuit, and the Sixth Circuit *en banc* (by refusal to rehear) have all confirmed the reasonableness of the award of punitive damages under the facts of this case. The Court of Appeals in considering whether the award of punitive damages against these Petitioners was excessive held:

> The Tennessee Supreme Court has recently directed that in assessing the reasonableness of awarded punitive damage consideration should be given to the egregiousness of a defendant's acts and the financial worth of the Defendant. 'The more reprehensible the act, the greater the award of punitive damages,' *Coppinger Color Lab, Inc. v. Nixon*, 698 S.W.2d 72, 75 (Tenn. 1985). *Defendants' acts in the instant case were certainly egregious and the punitive damages award, when*

> *viewed against Defendants' aggregate net worth of over thirty-seven million dollars, was not excessive.* [Emphasis added] (Appendix A, pp. 5a-6a)[3]

The conclusion by the Court of Appeals that the award of punitive damages in the case at bar was not excessive affirms the conclusion of the trial judge and the verdict of the jury. This is significant not only because of the weight to be accorded the jury and trial judge but also in light of the Petitioners' argument that Eight Hundred Fifty Thousand Dollars ($850,000.00) of punitive damages against Defendants' with net worth in excess of Thirty-seven Million Dollars ($37,000,000.00) who committed repeated acts of fraud and concealment is, *per se*, excessive and unconstitutional.

Petitioners have sought to pinion their Petition for a Writ of Certiorari on the dicta contained in *Aetna Life Insurance Company vs. Lavoie*, ___ U.S. ___, 106 S.Ct. 1580 (1986). In *Aetna*, Chief Justice Burger, writing for the majority, concluded that a judgment must be reversed because a Justice of the Alabama Supreme Court should have disqualified himself for interest in light of similar planned litigation in which he would participate as a party. In the last grammatical paragraph of the opinion before the actual mandate, Justice Burger wrote:

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[3] The proof showed without dispute that the corporate Petitioners had a combined net worth of almost Twenty Three Million Dollars ($23,000,000.00). The Petitioner Friedman's net worth was in excess of Eight Million Dollars ($8,000,000.00) and that of the Petitioner Gordon exceeded Six Million Five Hundred Thousand Dollars ($6,500,000.00). (TR. Vol. VIII, pp. 2811, 2812)

> Appellant also argues that the retrospective imposition of punitive damages under a new cause of action violates its rights under the Contracts Clause of Article I, Section 10; that a $3.5 million punitive damage award is impermissible under the Excessive Fines Clause of the Eighth Amendment; and that lack of sufficient standards governing punitive damage awards in Alabama violates the Due Process Clause of the Fourteenth Amendment. In addition, Appellant contends that Ala. Code §12-22-72 (1975), under which any person who unsuccessfully appeals a money judgment is assessed ten percent (10%) penalty, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. These arguments raise important issues which, in an appropriate setting, must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them. ___ U.S. ___ , 106 S.Ct. 1580, 1589 (1986)

The Respondents respectfully assert that the case at bar is not "an appropriate setting" to consider these Constitutional issues. First, the Petitioners have consistently failed to raise these issues below and therefore have waived them. Second, the Petitioners conduct as described by the Court of Appeals was "*certainly egregious*" and therefore the amount of punitive damages was not excessive.

III. THE PUNITIVE DAMAGES IN THIS CASE DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Petitioners assert that "... the Due Process Clause required the Court to instruct the jury that it could award punitive damages only if it found by 'clear and convincing evidence' that the defendants had acted recklessly, willfully, or wantonly." (Petition, pp. 10-11) This proposition has been considered and held without merit by a recent decision of this Court. In *Smith vs. Wade*, 461 U.S. 30 (1983), the petitioner, Smith, an employee of the Missouri Department of Corrections, worked in the Algoa reformatory for youthful first offenders. The respondent, Wade, was awarded a jury verdict for compensatory and punitive damages upon proof that he was harassed, beaten, and sexually assaulted by two other inmates while Smith was in charge of his dormitory. The appeal questioned only the award of punitive damages. *Id.* at p. 33. The Petitioners offered two arguments:

> "... first, that actual intent is the proper standard for punitive damages in all cases under §1983; and second, that even if intent is not always required, it should be required here because the threshold for punitive damages should always be higher than that for liability in the first instance. 461 U.S. at 38.

The Court (Justice Brennan) found that the award of punitive damages was appropriate. Addressing the second part of the Petitioners' argument, e.g., that the threshold for punitive damages should always be higher than for liability in the first instance, the Court noted that such a conclusion would "... require a

departure from the rules of tort common law." 461 U.S. at 49. The Court stated:

> . . . Smith argues, the District Judge erred in not requiring a higher standard for punitive damages, namely, actual malicious intent.
>
> This argument incorrectly assumes that, simply because the instructions specified the same *threshold* of liability for punitive and compensatory damages, the two forms of damages were equally available to the Plaintiff. The argument overlooks a key feature of punitive damages—that they are never awarded as of right, no matter how egregious the defendant's conduct. 'If the Plaintiff proves sufficiently serious misconduct on the Defendant's part, the question whether to award punitive damages is left to the jury, which may or may not make such award.' D. Dobbs, Law of Remedies, 204 (1973) [footnote omitted by Court]. Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the Plaintiff for his loss. [footnote omitted] Hence, it is not entirely accurate to say that punitive and compensatory damages were awarded in this case on the same standard. To make its punitive award, the jury was required to find not only that Smith's conduct met the recklessness threshold (a question of ultimate fact), but also that his conduct merited a punitive award of $5,000 in addition to the com-

pensatory award (a discretionary moral judgment).

Moreover, the rules of ordinary tort law are once more against Smith's argument. There has never been any general common-law rule that the threshold for punitive damages must always be higher than that for compensatory liability. On the contrary, both the First and Second Restatements of Torts have pointed out that 'in torts like malicious prosecution that require a particular antisocial state of mind, the improper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages.' [footnote omitted] Accordingly, in situations where the standards for compensatory liability is as high as or higher than the usual threshold for punitive damages, most courts will permit awards of punitive damages without requiring an extra showing. Several Courts have so held expressly. [footnote . . . Johnson vs. Woman's Hospital, 527 S.W.2d 133, 141-142 (Tenn.App.), cert. denied (Tenn.1975)] . . . .

This common law rule makes sense in terms of the purposes of punitive damages. Punitive damages are awarded in the jury's discretion 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.' *Restatement (Second) of Torts*, §908(1) (1979). The focus is on the character of the tortfeasor's conduct whether it is of the sort that calls for deterrence and punishment over and

above that provided by compensatory awards. 461 U.S. at 51-54.

In the *Smith* case, the Judge instructed the jury that Wade could recover only if the Defendants were guilty of "gross negligence" or "egregious failure to protect." 461 U.S. at 33. With regard to punitive damages the District Judge charged the jury:

> In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct. . .
>
> The amount of punitive or exemplary damages as assessed against any defendant may be such sum as you believe will serve to punish that defendant and to deter him and others from like conduct. [Cite for transcript omitted] 461 U.S. at 33.

In the case at bar, Judge Wiseman's instruction was similar to that in *Smith* but went further and provided:

> Punitive damages may not be awarded when a Defendants' conduct is merely negligent and is not accompanied by malice or bad motive. In order for you to award exemplary or punitive damages, the Plaintiffs must prove that the Defendants' acts were characterized by fraud, malice, gross negligence, or oppression, or that the wrongful act was willfully done with a bad motive, or so reck-

> lessly as to imply a complete disregard of social obligations. Unless you find that such outrageous conduct occurred, you may not award punitive damages against any of these Defendants. Even if you find that such conduct occurred, however, you are not required to award punitive damages. The decision to award such damages lies in the jury's discretion. . .
>
> Among the factors which you may consider in assessing punitive damages are the following: The nature of the acts committed by the Defendants, the malice or wantonness of their acts, the motive for their acts, the manner in which the acts were committed, the injury intended or likely to result, the character and extent of the injuries suffered by the Plaintiffs, and the character of the Defendants. . . (Appendix C *Infra*, 9a-10a)

Thus, Judge Wiseman did separately charge the jury on the issue of punitive damages and, in fact, required a higher standard of culpability than that which was approved by this Court in *Smith*.

With regard to the Petitioners' insistence upon a higher burden of proof in cases involving punitive damages, this Court in *Curtis Publishing Co. vs. Butts*, 388 U.S. 130, 160 (1967), held that: ". . . there is, moreover, nothing in any of our past cases which suggests that compensatory and punitive damages are subject to different Constitutional standards of misconduct." The Court in this libel case, ruled on an argument similar to that contained in the Petition at bar stating:

> We would hold, therefore, that misconduct sufficient to justify the award of compensatory damages also justifies the imposition of a punitive award, subject of course to the limitation that such award is not demonstrated to be founded on the mere prejudice of the jury. . . 388 U.S. at 161.

The parallel of this ruling to a willful fraud case such as the case at bar is inescapable.

The Petitioners insist that, ". . . the Due Process Clause required the Court to instruct the jury that it could award punitive damages only if it found by 'clear and convincing evidence' that defendants had acted recklessly, willfully, or wantonly."[4] (Petition at pp. 10-11) The Petitioners are unable to cite any judicial authority supporting this proposition. Instead, the Petitioners cite five cases, each involving state-initiated action, where this Court found an absence of procedural due process safeguards. A brief discussion of these cases is appropriate.

In *Addington vs. Texas*, 441 U.S. 418 (1979), this Court held that the burden of proof for an *indefinite commitment to a state mental hospital* should be "clear and convincing."[5] In *Santosky vs. Kramer*, 455 U.S.

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[4] This is a new issue. The Court of Appeals rejected Petitioners' argument that Tennessee law required *fraud* be proved by a clear and convincing standard. (Petition Appendix A, p. 6a).

[5] In reaching its decision, the Court acknowledged: "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." 441 U.S. at 431. This proposition is evidenced by the fact that as of 1986, 24 states have passed legislation regulating the award of punitive damages. Kenneth

745 (1982), this Court found that due process required "clear and convincing evidence" before *parental rights could be irrevocably terminated* with a natural child. In *Wisconsin vs. Constantineau*, 400 U.S. 433 (1971), this Court found that a hearing was required before the chief of police could "post" an individual in all liquor stores in his jurisdiction *forbidding the gift or sale of liquor* to that individual. In *Matthews vs. Eldridge*, 424 U.S. 319 (1976), this Court ruled that a hearing must be held before the Social Security Administration could *terminate disability benefit payments*. Finally, in *Colorado vs. New Mexico*, 467 U.S. 310 (1984), this Court required a clear and convincing evidence standard from Colorado before allowing diversion of the Vermejo River away from New Mexico in an *interstate water apportionment* case.

The Petitioners seek to equate these constraints on *governmental* decisions which deprive individuals of their livelihood, their children, their fundamental liberties or life-giving water with the "mere loss of money" *Santosky* 455 U.S. at 756. Petitioners suggest an unprecedented departure from the common law burden of proof in civil damage suits.

In *Calhoun vs. Baylor*, 646 F.2d 1158, 1163 (6th Cir. 1981), the Court of Appeals specifically held that:

> "Defendants also argue that the District Court should have instructed the jury that proof of fraud must be 'unequivocable and convincing.' The jury was instructed properly that Tennessee law requires proof by only a

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R. Redden, *Punitive Damages*, §5.2 pp. 161-506, Supp. pp. 276-303 (1986).

preponderance of the evidence." 646 F.2d at 1163.

Due process is not a technical conception unrelated to time, place, and circumstance. It is compounded by history, reason, and the past course of decisions. *Ingraham*, 430 U.S. at 675.

In this case, the entire spectrum of procedural and substantive protections afforded by the Federal judicial system have been enjoyed by the Petitioners. They would now seek to rewrite the common law and procedural rules of both the State of Tennessee and the federal judiciary in an effort to avoid the obligations decreed by a jury and affirmed by the trial court and the United States Court of Appeals.

CONCLUSION

Respondents submit that the Petition for a Writ of Certiorari is without merit, both procedurally and substantively. Respondents ask that this Court deny the Petition.

Respectfully submitted,

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DATED: October 24, 1986

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85-5527

A & B FOOD SERVICES CORPORATION, M.C. MANAGEMENT CORPORATION #7, M.C. MANAGEMENT CORPORATION #8, AB MANAGEMENT CORPORATION #8,
Plaintiffs-Appellees,

v.

JUDY'S FOODS, INC.; GENERAL CARE CORPORATION; MARVIN FRIEDMAN; AND JOEL GORDON,
Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Tennessee

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Decided and filed June 3, 1986

Before: KRUPANSKY and GUY, *Circuit Judges*; and HOLSCHUH, *District Judge*

PER CURIAM. Defendants/appellants Judy's Foods Inc., General Care Corporation, Marvin Friedman and Joel Gordon (collectively referred to as "defendants")

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* Hon. John D. Holschuh, United States District Judge, Southern District of Ohio, sitting by designation.

appealed the jury verdict and denial of their motion for judgment notwithstanding the verdict in this diversity action.

In 1976, General Care Corporation, a Tennessee corporation, formed Judy's Foods, Inc. ("Judy's") for the purpose of owning, operating and franchising limited menu fast food restaurants under the name "Judy's Homestyle Hamburgers and Fixins." The individual defendants, Marvin Friedman and Joel Gordon, were officers, directors, and members of the Executive Committee of both Judy's and General Care Corporation.

Judy's solicited Agostine Malerba ("Malerba"), to become its franchisee in the greater Philadelphia area. In May, 1978, Malerba, relying upon the representations of Judy's, executed an agreement with Judy's, which granted to Malerba an option to franchise a total of fifteen Judy's restaurants in the geographical area of Philadelphia. Malerba assigned one-half of his interest in the franchisee agreements to his business partner, Buddy Cooperberg ("Cooperberg") and they in turn formed the three plaintiff corporations, A & B Food Services Corporation, M.C. Management Corporation # 4 and M.C. Management Corporation # 7 to construct and operate two Judy's franchises in Philadelphia. Malerba and Cooperberg were the sole stockholders of the corporate plaintiffs, and their franchise rights were assigned to the corporations. Plaintiff's completed the construction of two Judy's restaurants which commenced business operations during February and June of 1979. Both restaurants proved to be unprofitable and were closed in December of 1979 and October of 1980 respectively.

Thereafter, plaintiffs initiated this action in the federal district court charging the defendants with fraud, negligent misrepresentation, intentional failure to disclose vital business information, conspiracy, and breach of contract which caused substantial injury to the plaintiffs. At the conclusion of a three and one-half week trial, the jury

returned a verdict in favor of plaintiffs, having concluded that defendants had failed to disclose critical business information to the plaintiffs and had committed fraudulent concealment and constructive fraud. Defendants timely moved for a judgment notwithstanding the verdict or, in the alternative, a new trial. The court denied the motions and this appeal ensued.

Defendants' first assignment of error charged that the district court's submission of the issue of constructive fraud to the jury was improper. Defendants argued that an action for constructive fraud could be maintained only upon proof of a confidential relationship between plaintiff and defendant and that, as a matter of law, the facts of the case did not give rise to such a relationship. This assignment of error is disposed of by *Edwards v. Travelers Insurance Company of Hartford, Connecticut*, 563 F.2d 105, 114 (6th Cir. 1977) wherein this circuit reviewed the Tennessee law of constructive fraud and observed:

> A definition of constructive fraud was given in *Maxwell v. Land Developers, Inc.*, 485 S.W. 2d 869, 875 (Tenn. App.), *cert. denied*, (1972).
>
> > "Constructive frauds are acts, statements or omissions, which operate as virtual frauds on individuals, or which, if generally permitted, would be prejudicial to the public welfare, and are not clearly resolvable into mere accident or mistake, and yet may have been unconnected with any selfish evil design, or may amount, in the opinion of the person chargeable therewith, to nothing more than what is justifiable or allowable." Gibson's Suits in Chancery 5th Ed. Vol. II, § 982, p. 217. Constructive fraud may be established where there is a breach of legal or equitable duty, whether or not fraudulent intent be present. *Bank of Blount County v. Dunn*, (1929) 10 Tenn. App. 95.

> Failure to disclose thus becomes fraudulent when it is the duty of a party having the knowledge to reveal the facts to the other party. *Domestic Serving Machine v. Jackson*, 83 Tenn. 418, 424-25 (1885); *Dozier v. Hawthorne Development Co., supra*, 37 Tenn. App. 279, 262 S.W. 2d 705; *Georgia Marble Co. v. Standard Tile Co., supra*, 19 Tenn. App. 258, 86 S.W. 2d at 432.

The *Edwards* court went on to conclude that the "duty" to disclose known facts arises when there exists a "confidential relationship", which the court defined as:

> one in which "confidence is placed by one in the other and the recipient of that confidence is the dominant personality, with the ability, because of the confidence, to influence and exercise dominion over the weaker or dominated party." *Iacometti v. Frassinelli*, 494 S.W. 2d 496, 499 (Tenn. App.), *cert. denied* (Tenn. 1973).

In light of this circuit's pronouncements in *Edwards v. Travelers Insurance Co. of Hartford, Connecticut*, this court concludes that the trial court properly submitted the issue of the defendant's duty to disclose material business information to the plaintiff franchisees to the jury for disposition. Moreover, a review of the record disclosed that sufficient probative evidence supported the jury's decision that a relationship of confidence existed between the parties that required Judy's to disclose material facts that impacted upon the current and future viability of its entire franchising and business operations and the interrelated business operations of its individual franchisees which Judy's intentionally failed to do.

Defendants also asserted that the district court's refusal to grant a remittitur to reduce the jury's award of punitive damages was error because the award was excessive and disproportionate to the injuries suffered by the plaintiff. It should initially be noted that this circuit

has long adhered to the view that where, as here, a damage award has been determined by the jury and left undisturbed by the trial court, the award bears a presumption of correctness. As this court noted in *Manning v. Altec, Inc.*, 488 F.2d 127 (6th Cir. 1973):

> Where the jury finds a particular quantum of damages and the trial court refuses to disturb its findings on the motion for a new trial, the two factors press in the same direction, and an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial.

488 F.2d at 133 (quoting *Taylor v. Washington Terminal Company*, 409 F.2d 145, 148 (D.C. Cir.) *cert. denied*, 396 U.S. 835 (1969)). *See also Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1572 (6th Cir. 1985).

Moreover, while defendants argued that plaintiffs failed to prove a reasonable relationship between the punitive damages and actual injury, Tennessee has never adopted the reasonable relationship test. Instead, Tennessee courts have ruled that punitive damages "are allowed as punishment of the wrongdoer and are not based so much upon the nature and extent of the injury as they are upon the oppression of the party who does the injury." *Lazenby v. Universal Underwriters Insurance Co.*, 214 Tenn. 639, 642, 383 S.W.2d 1, 4 (1964); *Johnson v. Husky Industries, Inc.*, 536 F.2d 645, 650 (6th Cir. 1976); *Cathey v. Johns-Manville, supra.*

Viewing the evidence under the aforementioned standards, this court is constrained to conclude that the punitive damage awards were not "contrary to all reason." *Manning v. Altec, Inc., supra.* The Tennessee Supreme Court has recently directed that in assessing the reasonableness of awarded punitive damage consideration should be given to the egregiousness of a defendant's acts and the financial worth of the defendant. "The more repre-

hensible the act, the greater the award of punitive damages," *Coppinger Color Lab, Inc. v. Nixon*, 698 S.W. 2d 72, 75 (Tenn. 1985). Defendants' acts in the instant case were certainly egregious and the punitive damages award, when viewed against defendants' aggregate net worth of over thirty-seven million dollars, was not excessive.

This court having reviewed the defendants remaining assignments of error concludes that they are not well taken. For the foregoing reasons, the decision of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-5527

A&B FOOD SERVICES CORPORATION, *et al.*,
Plaintiffs-Appellees,

v.

JUDY'S FOODS, INC., *et al.*,
Defendants-Appellants

[Filed Aug. 4, 1986]

Before: KRUPANSKY and GUY, *Circuit Judges*, and HOLSCHUH* *U.S. District Judge*

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

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* Hon. John D. Holschuh sitting by designation from the Southern District of Ohio.

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

APPENDIX C

EXCERPT OF THE JOINT APPENDIX FILED IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT CONTAINING A PORTION OF THE TRIAL COURT'S CHARGE (TR. Vol. II pp. 300-301)

* * * *

Punitive Damages. The plaintiffs have requested that in addition to compensating them by awarding them compensatory damages, you should award the plaintiffs "punitive damages." In certain cases, the law allows a jury to award an injured party punitive or exemplary damages. Such damages are awarded in excess of and in addition to compensatory damages. That is, punitive damages are not intended to compensate an injured party for personal injury or property damage, but to punish a party, to deter him from committing acts of a similar nature, and to make a public example of him.

Punitive damages may not be awarded when a defendant's conduct is merely negligent and is not accompanied by malice or bad motive. In order for you to award exemplary or punitive damages, the plaintiffs must prove that the defendants' acts were characterized by fraud, malice, gross negligence, or oppression, or that the wrongful act was willfully done with a bad motive, or so recklessly as to imply a complete disregard of social obligations. Unless you find that such outrageous conduce occurred, you may not award punitive damages against any of these defendants. Even if you find this such conduct occurred, however, you are not required to award punitive damages. The decision to award such damages lies in the jury's discretion.

You may not award punitive damages unless you also award compensatory or nominal damages. This is true even

if the defendants' actions were willful, malicious, fraudulent or oppressive.

Among the factors which you may consider in assessing punitive damages are the following: The nature of the acts committed by the defendants, the malice or wantonness of their acts, the motive for their acts, the manner in which the acts were committed, the injury intended or likely to result, the character and extent of the injury suffered by the plaintiffs, and the character of the defendants. In short, you should consider what will be a proper punishment for the defendants and what deterrent effect the award will have on others who contemplate committing similar acts. In assessing the size of a punitive damage award you may consider the net worth of the particular defendant.

The defendants seek a recovery under a theory of quantum meruit. Such an award is made when one party confers a benefit upon another even though he is under no duty to do so, and that in order to prevent the recipient of the benefit from being unjustly enriched equity directs that the recipient pay over the giving parting the value of

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 86-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JUDY'S FOODS, INC., *et al.*,
Petitioners,

v.

A&B FOOD SERVICES CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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U.S. Const. Amend. VIII:

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ARGUMENT

The petition for certiorari presents two constitutional questions that this Court has already described as important and warranting review. Respondents do not dispute the importance of the questions presented, and their arguments opposing review are unpersuasive.

I. THE QUESTIONS PRESENTED ARE PROPERLY BEFORE THE COURT.

Respondents contend (Br. in Opp. 3-6) that petitioners waived their constitutional objections by not denominating them as such in the district court and during the pendency of the appeal. This contention is without merit.

There can be no question that in the proceedings below petitioners challenged the punitive damages award as excessive and the trial court's failure to instruct the jury

on the clear and convincing standard of proof. Specifically, petitioners argued both in the district court and on appeal that the punitive damages award was unlawful because it violated a common law requirement that punitive damages must bear a reasonable relationship to actual injury. The common law rule on which petitioners relied in the lower courts has the same historical underpinnings as the Excessive Fines Clause of the Eighth Amendment, on which petitioners base their constitutional argument. *See* Pet. for Cert. 7-9. With regard to the proper standard of proof for punitive damages, petitioners argued in the district court and on appeal that the elements of fraud must be proven by clear and convincing evidence. This argument subsumed within it the claim that an award of punitive damages for any fraudulent conduct found must also be based on a heightened standard of proof.

The fact that petitioners did not initially clothe their arguments in constitutional garb is not dispositive, for a number of reasons. To begin with, petitioners' arguments below were more than sufficient "to bring into focus the precise nature of the alleged error[s]." *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943). The district court was placed on notice concerning petitioners' objections to the excessive nature of the punitive damages award and to the court's failure to instruct the jury to assess petitioners' liability for fraud (and, necessarily, for any punitive damages arising therefrom) under the clear and convincing evidence standard.

Moreover, petitioners' constitutional arguments were presented to, and considered by, the court of appeals. In denying the petition for rehearing, that court stated that the constitutional arguments raised by petitioners had been "fully considered upon the original submission and decision of the case." Pet. App. 8a. Having been raised and decided by the court of appeals, the constitutional questions presented in the petition are properly before

this Court.[1] Thus, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255-256 (1981), the Court rejected the argument that a challenge to a jury instruction on punitive damages had not been adequately preserved because the petitioner had failed to object to the charge at trial. Noting that the district court and court of appeals had reached and adjudicated the petitioner's claim, the Court concluded that the interests of fair and effective administration of justice would not be served by this Court's refusal to consider that claim. *Cf. Youakim v. Miller*, 425 U.S. 231, 233-234 (1976) (Court considered Supremacy Clause issue even though that issue had not been raised in the lower court as an independent ground for invalidating the state law in question).

Finally, we note this Court's occasional practice of deciding an issue not presented either in the district court or in the court of appeals, where the issue is important and recurring and has been squarely presented in the petition for certiorari. *E.g., Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). Here, of course, the constitutional issues were raised and decided adversely to petitioners in the court of appeals, and they were raised (although not specifically in their constitutional dimension) in the district court. Given the unquestioned importance and recurring nature of these issues, the interests of sound judicial administration would be served by this Court's granting review and addressing the issues on their merits.

II. THE HISTORY OF THE EXCESSIVE FINES CLAUSE DEMONSTRATES THAT IT APPLIES TO PUNITIVE DAMAGES AWARDS.

Respondents candidly concede that "[t]he amount [of punitive damages] awarded against each Petitioner *was calculated to punish*." Br. in Opp. 13 (emphasis added).

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[1] For this reason, the cases on which respondents rely (Br. in Opp. 5-6) are inapposite. In those cases, the questions presented had never been raised in the lower courts.

Respondents argue (Br. in Opp. 6-16), however, that punitive damages awards are not subject to the Excessive Fines Clause of the Eighth Amendment because that Clause applies only to punishments exacted in criminal cases. This argument falls of its own weight.

All of the cases on which respondents rely (Br. in Opp. 7-10) in support of their contention that the Excessive Fines Clause is confined to criminal punishments involved the Cruel and Unusual Punishment Clause, not the Excessive Fines Clause. As demonstrated in the petition, at 7-9, the history of the Excessive Fines Clause establishes that the Clause was intended to apply to civil as well as criminal fines. Respondents do not challenge our historical analysis. Thus, the cases cited by respondents are inapposite and their argument is misdirected because they have failed to focus on the precise provision of the Eighth Amendment on which we rely.

III. THE DUE PROCESS ISSUE HAS NOT BEEN PREVIOUSLY DECIDED BY THIS COURT.

Relying on *Smith v. Wade*, 461 U.S. 30 (1983), respondents mistakenly assert (Br. in Opp. 17) that this Court has already considered and rejected the due process issue presented in the petition. The petition presents the question whether the Due Process Clause bars the imposition of punitive damages absent evidence that satisfies the clear and convincing standard of proof. This Court's decision in *Smith v. Wade* did not address that question.

In *Smith v. Wade*, the plaintiff, a prison inmate, recovered punitive damages from a prison guard who was found to have been grossly negligent in placing the plaintiff in a section of the prison where he was beaten and sexually assaulted by other inmates. The guard argued that punitive damages could not be based on reckless disregard for the plaintiff's rights or safety, but required actual malicious intent to injure the plaintiff. 461 U.S.

at 37. The Court rejected this argument and adhered to the traditional rule that punitive damages can be awarded "not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence." *Id.* at 48 (footnote omitted).

Smith v. Wade, therefore, concerned the substantive elements that must be found before punitive damages can be awarded. It did not address the separate, procedural question presented here, concerning the constitutionally-required standard of proof for assessing whether those substantive elements have been established. On this issue, respondents have failed to respond to the compelling reasons set forth in the petition for requiring application of a heightened standard of proof on the issue of liability for punitive damages. *See* Pet. for Cert. 11-14.

CONCLUSION

For the foregoing reasons and those set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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